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STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC.

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ADMISSIBILITY OF EVIDENCE AS TO TESTIMONY GIVEN AT A FORMER TRIAL TO SHOW THAT SUCH TESTIMONY WAS INCONSISTENT WITH THAT GIVEN AT A SECOND TRIAL.

In a recent New York case the Court held that a witness who was present at the former trial, and heard the testimony and remembered the substance of it was a competent witness to show that such testimony at the former trial was inconsistent with that given at the second trial. *Mc Rorie v. Monroe,* 203 N. Y., 426.

It appeared that at the trial of the case it became very important for the defendant to show that the plaintiff's testimony varied from the testimony given by him at a former trial of the case, and to show this inconsistency he introduced a witness who was present at the former trial, and heard the testimony which the plaintiff gave and remembered it.

It is a well established rule of evidence that declarations under oath are admissible at a subsequent trial if the person against whom the evidence is to be used has had an opportunity to cross-examine the witness when the testimony was taken, and the question in issue is the same as in the proceeding in which the testimony was taken, in the following cases: Where the witness who testified is dead; or physically or mentally incapable of being present at the trial; or has been kept away from the trial by the adverse party; or, in civil cases, is out of the jurisdiction of the Court, or cannot be found. *Stevens Digest,* Art. 32 and note.

In this class of cases the manner of proof of the previous testimony is not governed by any well defined rule which is applicable in all cases. If the testimony has been written down by a stenographer, or other person, such statements form the bases of proof. If the testimony has not been written down, the evidence of any one who heard it and remembered it is sufficient. *Steward v. Bank,* 43 Mich., 257.

There has been some conflict in the cases in England as well as in the United States as to the exactness required of the witness in repeating the testimony. One line of cases holds that the witness must repeat the testimony with literal exactness, the other and more liberal view, that it is sufficient if the witness can state the whole substance of the former testimony. It is the generally accepted rule that it is not necessary that the precise language of the former testimony should be repeated. This would naturally follow from the rule allowing a person who heard the testimony to be a witness, for it would be impossible for such a person to give the exact language. *Wagers v. Dickey,* 17 Ohio, 439.

This class of cases should be distinguished from the principal case, for in the one case the witness is before the Court, and in the other he is not within its jurisdiction. The purpose for which the testimony of the witness was admitted in the principal case

was to show that the plaintiff's testimony at the former trial was inconsistent with that given at the first trial, and therefore he was capable of making errors in his testimony, which affects his capacity to testify. In other words both statements cannot be correct, and therefore he shows a capacity to err. It is the repugnancy of the two statements that is fatal. The question which is before the Court is what is the proper method of showing this inconsistency?

Statements made at a former trial are matter of record and it is a general rule that the minutes of testimony of the witness taken at a former trial, when properly proved may be read in evidence to impeach the same witness on a second trial. *Smith v. State,* 28 Ga., 19. The most natural method is to place the two contradictory statements side by side, and as both cannot be correct one of the statements must have been spoken erroneously. It is oftentimes hard to attribute this error to any specific fault. It has often been said that a prior Self Contradiction, "shows a defect either in memory or in honesty" of the witness.

Another way of proving testimony given at a former trial is by witnesses who were present and heard the testimony given. This testimony may be in the form of a stenographic report, memorandum, or notes, or may be given by a witness who heard the testimony given and remembered it.

In the case of *Olds v. Powell,* 10 Ala., 393, a witness called to impeach another witness, swore that on a former trial the witness had sworn differently. On cross examination he admitted he had taken a memorandum of what the witness had testified on the former trial, which was correct as far as it went. The Court held that the memorandum might be looked at by the witness himself for the purpose of refreshing his memory of the facts, but that it was not an instrument of evidence and therefore improper to go to the jury. In *Pound v. Georgia,* 43 Ga., 89, the counsel for the plaintiffs offered in evidence testimony in writing of a witness taken down by a person who was present at the former trial. The Court held that such testimony when properly proven could be offered in evidence to discredit the witness' testimony in whole or in part.

Where a witness was present at the taking of a deposition of a party to the record, such witness may be permitted to testify to the admissions and declarations made by such party, notwithstanding the fact that the declarations and admissions were reduced to writing, and embodied in a deposition. *Deitz v. Regnier,* 27 Kansas, 94. In the case of *Pearce v. Farr,* 10 Miss., 54, the Court held that where a witness has testified to facts, in a case of assault and battery before a justice of the peace, and the witness testifies again at a subsequent trial, it is competent to introduce the justice of the peace before whom the first trial was had, to prove what the witness swore to, in order to impeach his testimony. In the case of *State v. Mc Donald,* 65 Me., 466, the Court held that a witness may be impeached by showing that he testified differently at a former trial, and his testimony may be proved by anyone who heard and recalled it. There is no rule of law which makes the stenographic report the only competent evidence in such a case.

The foregoing decisions seem to establish that the record furnishes the strongest evidence of what a witness testified at a former trial, but it is not the only evidence admissible to impeach his testimony. Testimony taken by counsel or his stenographer may be offered in evidence when properly proven. Former testimony may be proven by witnesses who were present and heard the testimony given. In such cases notes taken by them may be used to refresh their memory by reference to them, although they are not proper evidence for the jury. If the witness is able to repeat the substance of the testimony at a prior trial, he is a competent witness, to show that such testimony was inconsistent with that given at a second trial.

WAIVER OF STATUTORY QUALIFICATIONS OF JUROR IN CAPITAL CASES.

The Court of Appeals of New York held, a few months ago, in *People v. Cosmos,* 98 N. E., 408, that the defendant even in a capital case might be deemed to have waived the fact that one of the jurors did not possess the statutory qualifications of a juror. In this case Cosmos was found guilty of first degree murder, "upon evidence which amply supports the verdict." After the imposition of sentence, counsel for defense moved to set aside